In the Supreme Court of the United States

OCTOBER TERM, 1925

No. 241

DORRIS MOTOR CAR COMPANY, APPELLANT

v.

THE UNITED STATES

APPEAL FROM THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

THE OPINION OF THE COURT OF CLAIMS

The Findings of Fact, Conclusions of Law, and the Opinion of the Court of Claims appear at pages 13 and 21 of the Record and are reported in 60 Ct. Cl. 68.

GROUNDS OF JURISDICTION

The Dorris Motor Car Company by an appeal under Section 242 of the Judicial Code filed January 9, 1925, seeks to review a judgment of the Court of Claims entered December 1, 1924 (R. 22), which denied the company's claim of $21,147.67 for prospective profits.

STATEMENT

The question in this case is whether the appellant is entitled to recover the profits it would have made if its contract with the United States had not been terminated. It received, under a contract of settlement, reimbursement for all other losses resulting from the termination.

The Dorris Motor Car Company entered into a contract with the Government, dated October 5, 1918, for the manufacture of 1,450 Liberty Motor governors at $28.90 each and the same number of Liberty Motor petrol air pumps at $37.75 each. (R. 3–13.) The governors were to be delivered during October, 1918, and the air pumps during the following December and January. (R. 4.) By Article XIV of the original contract provision was made for its termination in the event of the termination or limitation of the war, or if in anticipation of the termination of the war the completion of the contract should be deemed unnecessary. (R. 9.) The only notice provided for in such case was that the chief of ordnance should "notify the Contractor that any part or parts of the articles then remaining undelivered shall not be manufactured or delivered." There was a further provision that:

> In the event of such complete or partial termination the United States shall inspect all completed articles then on hand and such as may be completed within thirty (30) days after such notice, and shall pay to the Con-

> tractor the price herein fixed for all articles accepted by and delivered to the United States.

The United States also agreed to pay in such event for the cost of materials, component parts, labor, and other items on uncompleted articles. There was no provision for the payment of any profit on the uncompleted part of the contract.

The governors were delivered and paid for. The air pumps had not been completed. (R. 14.) The armistice came. In a conversation with one of the agents of the War Department a representative of the contractor objected to a suspension of operations and referred to Article XIV of the contract. The officer insisted that operations cease, but the operations did not cease. (R. 14, Finding IV.)

On December 14, 1918, the Ordnance Department by letter "requested the plaintiff to suspend operations under said contract." (R. 14.) Upon receipt of this request the contractor directed its general manager to discuss the matter with the members of the local claims board at St. Louis. A representative of the claims board stated that unless the suspension request was accepted the contractor would not receive the cooperation of the claims board in obtaining compensation. Thereupon the contractor's board of directors "decided to accept and did agree to the suspension." (R. 14.) On December 17, 1918, the contractor notified the Government that "it would suspend operations

in pursuance of the said request therefor," and thereafter did nothing further towards the completion of the contract. The letters requesting and agreeing to suspension were not offered in evidence. (Finding IV, R. 14.)

A few days after the contractor suspended operations the local claims board informed the contractor that it had received an outline of a method by which claims should be presented. Thereupon the contractor and agents of the claims board prepared a claim for the contractor. (R. 14.) This claim included expenditures amounting to approximately $20,000 for labor and overhead and for material and equipment obtained for the purpose of manufacturing the pumps. (Finding V, R. 15.) It also included an item for " Loss due to cancellation," in the sum of $21,147.67, and an item for " Overhead for six months," in the amount of $5,035.35. The local claims board sent the claim to the Ordnance Department Claims Board for approval. This Board approved the items for material, equipment, direct labor, and overhead with slight modifications, but disallowed the item for " Loss due to cancellation " and the item for " Overhead for six months." (R. 15.) The contractor accepted the revision and entered into an agreement with the Government designated as a " Settlement Contract, Form 2-C " (R. 15), dated April 19, 1919, by which the Government agreed to pay to the contractor $16,279.21, the sum allowed by the Ordnance Department less a value placed upon the

property which it was agreed the contractor might retain. The Settlement Contract contained the following recitals (R. 16):

> Whereas the furnishing and delivery of further articles under said original contract will exceed the present requirements of the United States; and
>
> Whereas it is in the public interest to amend said original contract as herein provided * * *; and
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> * * * * *
>
> Whereas the contractor is willing to waive any and all rights that it may have under the provisions of the original contract to a specified notice of termination or to continue the performance of said contract to any extent after the receipt of such notice of termination; * * *.

The parties agreed as follows (R. 16):

> 2. This supplemental contract shall operate as an exercise of the termination or cancellation of said orignal contract provided in the clause thereof relating to termination or cessation of hostilities or termination in the public interest except that the contractor waives any and all rights that it may have under the provisions under the original contract to a specified notice of termination or to continue the performance thereof to any extent, and the contractor shall furnish and deliver and the United States shall accept and pay for no more articles, work, or serv-

> ices, agreed to be delivered or done, whether for product, equipment, or facilities or other purposes under said original contract, except that all articles, work, or services delivered and accepted on or before the date of this supplemental agreement, under and in pursuance of the original contract and not yet paid for, shall be paid for in accordance with the provisions of said original contract, and the contractor will hereafter do no act or thing which will increase the liability of the United States or the amount to be paid by it * * *.

The Settlement Contract provided that the rights and obligations of the parties should not be deemed canceled or terminated thereby except as provided therein and contained the following reservation on behalf of the contractor (R. 16–17):

> * * * there is hereby reserved to the contractor the right to assert an additional claim against the United States arising out of alleged letters, telegrams, and orders from the United States pertaining to an alleged amendment to the said original contract and which has been known as First Supplemental Contract on amendment to War–Ord.–No. P16036–2588ME.

There is nothing in the record explaining or identifying the matter referred to in this reservation or the nature of the "First Supplemental Contract."

The Settlement Contract provided that the United States should pay the items enumerated

therein. It was also agreed that the United States should pay from time to time such other sum or sums as might be found justly due the contractor by the contracting officer for items of expenditure incurred in the performance of the original contract. The contractor accepted the compensation paid pursuant to the Settlement Contract.

Thereafter the contractor instituted this suit in the Court of Claims for prospective profits in the sum of $21,147.67, the amount set forth in the claim as the item "Loss due to cancellation," and rejected by the Ordnance Department before the execution of the Settlement Contract. (R. 1–3.) The contractor also demanded the payment of the overhead item of $5,035.35, but this item was abandoned. (R. 20.) The Court of Claims found that the contractor could have completed all of the pumps within thirty days after December 14, 1918, and that its profit would have been $21,147.67 if it had completed performance. (R. 20.)

In its petition the contractor alleged as the breach that production was suspended in compliance with the Government's request, and that on or about the second of January it offered to resume production and to manufacture and deliver the air pumps, "but the United States did then wholly refuse to accept and pay" therefor "to the great damage of your petitioner." (R. 2.) The petitioner failed to prove the offer to resume and the refusal by the United States. (R. 13–22.) The contractor now argues that the request for suspension and its

acceptance constituted an anticipatory breach and that the waiver of the right to continue "waived nothing." (Brief, 8.) The Government asks for an affirmance on the ground that production was suspended by consent and the right to continue canceled by contract.

SUMMARY OF ARGUMENT

I. If the contract had been terminated as therein provided, the contractor would have been bound to continue operations for thirty days and the United States would have been bound to take and pay for all air pumps which could have been completed within thirty days after notice of termination.

The finding of the Court of Claims is that the suspension of work and the failure of the contractor to continue work for thirty days was by mutual agreement and not the result of an order from the United States to cease work nor of an anticipatory breach by the United States in the form of a declaration of its intention not to take and pay for the pumps which could be completed in thirty days.

II. The Settlement Contract expressly provided that the contractor waived any right it had under the original contract to continue performance for thirty days after notice of termination. As the right to continue for thirty days after notice was the only provision on which could be based a claim for prospective profits on uncompleted work, it follows that the settlement agreement relieved the United States of liability for prospective profits.

There was ample consideration for the Settlement Agreement in the termination of the contractor's obligation to continue for thirty days and in the adjustments made on other items. The settlement left the parties in the same position as if the original contract had not contained the clause requiring the United States to take and pay for such pumps " as may be completed within thirty days after such notice " of termination. With this deletion, the liabilities of the United States were admittedly discharged.

ARGUMENT

I

Production was suspended by consent

All of the facts relating to suspension of production as found by the Court of Claims are incorporated in Finding IV. (R. 14.) The court found that " on December 14, 1918, the Ordnance Department requested the plaintiff to suspend operations under said contract." This was not a command or a direction; it was only a request. The Government carefully avoided any act which might constitute a breach of contract. The letter was intended by the Government and accepted by the contractor as a suggestion for a discussion. A command requires obedience. A request solicits acquiescence. Upon receipt of the letter the company did not stop manufacture. On the contrary, its board of directors sent its general manager to discuss the matter with the members of the local claims

board. This he did. At this meeting there was no command to stop manufacture, no demand to minimize damages. The members of the local claims board acted strictly within their powers—the institution of negotiations for a settlement. They did not assume authority to interfere in the production of munitions. At this conference a representative of the claims board stated that unless the suspension was accepted the contractor would not receive the cooperation of the claims board in obtaining compensation. After this discussion the board of directors decided to and did agree to the suspension. (R. 14.) The board of directors evidently considered it to the interest of the company to deal with a friendly claims board in the adjustment of other items rather than to insist on the right to continue for thirty days.

On December 17, 1918, the plaintiff sent its reply to the Ordnance Department. There was no suggestion that it had stopped manufacture in obedience to a command, or had reduced damages after an anticipatory breach. The contractor stated that "it would suspend operations in pursuance of the said request therefor." Within a few days the local claims board notified the plaintiff of the receipt of an outline of a method for presenting claims. Agents of the claims board assisted the plaintiff in preparing its claim for compensation which resulted in the Settlement Contract.

After finding the above facts the court adds that prior thereto a representative of the contractor

and an agent of the War Department, whose identity and authority are not disclosed, had held a conversation in which the representative objected to suspension and called attention to Article XIV of the contract and the officer insisted that operations cease (R. 14), but there was no cessation at that time. See *Rubber Trading Co.* v. *Manhattan Rubber Manufacturing Co.*, 221 N. Y. 120.

In its opinion the Court of Claims referred to the acts in December as "a mutual agreement to suspend." Such acts do not constitute a repudiation of the contract. A request to suspend is not a breach. *Vogt Bros. Mfg. Co.* v. *Sloss-Sheffield Steel & Iron Co.* (C. C. A.), 297 Fed. 54; *McGregor* v. *Estate of Ross*, 96 Mich. 103, 106; *Gill Mfg. Co.* v. *Hurd*, 18 Fed. 673. A suggestion to delay performance is not a breach. *Brockenbrough* v. *Champion Fibre Co.* (C. C. A.), 176 Fed. 840. An attempt to modify an agreement is not a breach. *Bernstein* v. *Meech*, 130 N. Y. 354; *Fayette-Kanawha Coal Co.* v. *Lake & Export Coal Corp.*, 91 W. Va. 132. Even a threat to abandon a contract during negotiations is not a breach. *Hardeman-King Lumber Co.* v. *Hampton Bros.*, 104 Tex. 585, 588. There must be an unconditional and unequivocal repudiation, a positive refusal of further performances in order to justify the promissee in treating the contract as abandoned and in instituting suit for anticipatory profits. *Smoot's Case*, 15 Wall. 36, 48, 49; *Dingley* v. *Oler*, 117 U. S. 490, 502; *Frank F. Pels Co.* v. *Saxony Spinning Co.* (C. C. A.), 287 Fed. 282 (cert.

den., 263 U. S. 702); *Southern Cotton-Oil Co.* v. *Heflin* (C. C. A), 99 Fed. 339, 343; *Vittum* v. *Estey*, 67 Vt. 158, 161; *Wells* v. *Hartford Manilla Co.*, 76 Conn. 27; *Ollinger & Bruce Dry Dock Co.* v. *James Gibbony & Co.*, 202 Ala. 516; *Rochm v. Horst*, 178 U. S. 1. Whether in any case the acts and surrounding circumstances constitute such a repudiation and refusal is generally a question of fact. *Colorado Yule Marble Co.* v. *Collins*, (C. C. A.), 230 Fed. 78, 81; *Dobbling* v. *York Springs Ry. Co.*, 207 Pa. St. 123; *McGregor* v. *Estate of Ross*, 96 Mich 103; *Vogt Bros. Mfg. Co.* v. *Sloss-Sheffield Steel & Iron Co.* (C. C. A.), 297 Fed. 54. The Court of Claims has determined these facts in favor of the Government. Production was deferred by a "mutual agreement to suspend."

II

The contract was terminated by agreement

The contractor suspended operations by consent. Any right to continue was subsequently surrendered by contract. After the item for prospective profits had been rejected by the Ordnance Department and the other items substantially approved, the parties entered into the Settlement Contract. (R. 15–18.) The temporary nature of the suspension was recognized. The contract recited that the furnishing and delivery of further articles "under said original contract will exceed the present requirements of the United States." As an

inducement for the Government to enter the Settlement Contract it was stated that the contractor was willing to waive its rights "under the provisions of the original contract to a specified notice of termination or to continue the performance of said contract to any extent after the receipt of such notice of termination." The contractor desired payment of its items of expense as rapidly as they could be determined from time to time. The rights of the parties were to be protected except as expressly changed.

It was provided that (R. 16):

> This supplemental contract shall operate as an exercise of the termination or cancellation of said original contract provided in the clause thereof relating to termination or cessation of hostilities or termination in the public interest except that the contractor waives any and all rights that it may have under the provisions under the original contract to a specified notice of termination or to continue the performance thereof to any extent * * *.

And it was provided that—

> the contractor shall furnish and deliver and the United States shall accept and pay for no more articles * * *.

This Settlement Contract clearly recognized that the original contract continued in existence for performance by both parties, and that additional articles might be delivered. The obligations of both

parties in this respect were modified and limited to the articles previously delivered. The Liberty Motor governors had been delivered, the petrol air pumps had not. The Settlement Contract was substituted for the notice of termination and the contractor waived the right to continue for thirty days. The articles delivered and accepted and the items of expense on uncompleted articles were to be paid for pursuant to the original contract.

The termination clause of the original contract provided: "In the event of such complete or partial termination the United States shall inspect all completed articles then on hand and such as may be completed within thirty (30) days after such notice, and shall pay to the Contractor the price herein fixed for all articles accepted by and delivered to the United States * * *" and the items of expense incurred in relation to the uncompleted articles. (R. 9.) The original contract was accordingly modified, and as modified has been performed by the Government. (See *Savage Arms Corporation* v. *United States*, 266 U. S. 217.)

There was reserved to the contractor "the right to assert an additional claim against the United States arising out of alleged letters, telegrams, and orders from the United States pertaining to an alleged amendment to the said original contract and which has been known as First Supplemental Contract on amendment to War–Ord.–No. P16036–2588M E." (R. 17.) There is nothing in the record

either to identify or to indicate the nature of these alleged letters, telegrams, and orders or to suggest the purpose of the said alleged "First Supplemental Contract." The silence of the record precludes any discussion of this reservation.

If, as the contractor claims in its brief (p. 8), "the notice of termination had been given" in December, the contractor failed to take advantage of the provision authorizing a continuance of production for thirty days after receipt of the notice. The Government has accepted all of the articles completed, and has paid for all of the articles delivered and the other items of expense. This was the full extent of its obligation. It is unnecessary to consider what the rights or obligations of the parties might have been if the negotiations had failed. (See *College Point Boat Corporation* v. *United States*, 267 U. S. 12.)

The negotiations were successful and it was agreed that the air pumps should not be completed. The operations had been suspended by consent. The obligations have been canceled by contract. The judgment should be affirmed.

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MARCH, 1926.

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